SUPREME COURT, U. S.

FILED
JUL 26 1974
MICHAEL RODAK, JR., CLERK

No. 74-15

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Respondent,

vs.

EDWARD E. REICIN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS P. SULLIVAN
ALAN L. METZ
Attorneys for Petitioner

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
1. Alternative Theories of Guilt	3
2. Refusal to Allow Dr. Atlas to Testify	5
Reasons For Granting the Writ	7
I. There Is a Conflict Between The Decision Below And Decisions of This Court And Several Courts of Appeals	8
II. A New Trial Was Required Because The Trial Court Committed Prejudicial Error In Refusing To Allow Petitioner To Call Dr. Atlas As An Expert Witness	12
Conclusion	15

INDEX TO APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit ..... App. 1

Government Closing Argument Regarding Count 9 App. 29

TABLE OF CASES

PAGE

Bachellar v. Maryland, 397 U.S. 564 (1970) 9

Beck v. United States, 298 F.2d 622 (9th Cir. 1962) 10

Beck v. United States, 305 F.2d 595 (10th Cir. 1962) .. 10

Coleman v. United States, 167 F.2d 837 (5th Cir. 1948) 14

Durland v. United States, 161 U.S. 306 (1896) 15

Eaton v. City of Tulsa, —— U.S. ——, 94 S. Ct. 1228 (1974) 9

Leary v. United States, 395 U.S. 6 (1969) 9

Norcott v. United States, 65 F.2d 913 (7th Cir. 1933) 14

Stromberg v. California, 283 U.S. 359 (1931) 7, 9

Thompson v. City of Louisville, 362 U.S. 199 (1960) .. 12

United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613 (1959) 4, 7, 9

United States v. Diamond, 430 F.2d 688 (5th Cir. 1970) 15

United States v. Driscoll, 449 F.2d 894 (1st Cir. 1971) .. 11

United States v. Groves, 122 F.2d 87 (2d Cir. 1941) ..4, 7, 10

United States v. Halperin, 441 F.2d 612 (5th Cir. 1971) 14

United States v. Meriwether, 440 F.2d 753 (5th Cir. 1971) 10

United States v. Shavin, 287 F.2d 647 (7th Cir. 1961) .. 15

United States v. Shuford, 454 F.2d 772 (4th Cir. 1971) 10

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO.

UNITED STATES OF AMERICA,
Respondent,

vs.

EDWARD E. REICIN,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Edward E. Reicin, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. This opinion is printed in the appendix (A. 1) to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on May 28, 1974. A timely petition for rehearing *en banc* was denied on June 27, 1974. This petition was filed within 30 days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when a general jury verdict of guilty may have been predicated on an alternative theory of guilt which was admittedly unproved?

2. Whether petitioner was denied a fair trial when the trial judge refused to allow an expert medical witness to testify whose testimony would have impeached the government's main witness on a material issue and would have offered substantive evidence on petitioner's theory of the case.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This petition seeks review of a decision of the Seventh Circuit Court of Appeals affirming a jury verdict of guilty on one of eleven counts of an indictment for mail fraud under 18 U.S.C. §1341.

1.

The Alternative Theories of Guilt.

Each count of the indictment charged the petitioner, an attorney, with conspiring with Dr. William Becker to defraud insurance companies in personal injury claims by (1) preparing and submitting false medical bills and reports for claimants, and by (2) causing claimants to take extra time off from their jobs in order to increase the damages.

The jury acquitted petitioner of ten counts, and convicted him on count 9. The facts pertinent to count 9 are set forth in the opinion of the Court of Appeals (A. 1-6). *

The government's case on count 9 was based on two alternative theories, namely, that petitioner did either or both of the following pursuant to the scheme:

1. Knowingly submitted to Royal Globe Insurance Company a false medical report and bill regarding the client Eauslin (par. 7 of the indictment) (A. 26);

2. Caused Eauslin to be absent from his job in order to inflate his claim (par. 10 of the indictment) (A. 27).

In closing argument, the prosecutor argued that the government had proven *both* branches of its alternative theory. (A. 29.) The trial judge instructed the jury that they could convict petitioner under Count 9 if the jury found that the government had proven *either* charge. (A. 11).

For purposes of this petition, petitioner assumes *arguendo* that the government introduced a *prima facie* case with regard to the first alternative, the medical report and bill. However, the government admitted on appeal and the 7th

---

* "A." refers to pages of the printed appendix to this brief. "R." refers to pages of the transcript of proceedings at trial. Additional factual appendices may be found in petitioner's initial and reply briefs filed in the Court of Appeals and made part of this record.

Circuit found that the government did not make a *prima facie* case with respect to the "lost time" charge, the second branch of the government's alternative theory. Thus, the Court of Appeals said (A. 9):

> ". . . we do agree that the Government's inability to establish that the defendant and Becker caused Eauslin to take unnecessary time off from his job weakened the Government's case. The issue is whether the lack of such proof, despite the presence of the other elements of the scheme as alleged in the indictment, vitiates the conviction on Count 9."

The Court of Appeals held that *Stromberg* v. *California,* 283 U.S. 359 (1931) was not on point because the doctrine of *Stromberg* is limited to special statutory provisions involving constitutional rights. The Court of Appeals said (A. 12):

> "In the case at bar, there is no danger that the defendant might have been found guilty for having engaged in conduct that the Government cannot constitutionally prohibit."

The Court of Appeals did not allude to this Court's opinion in *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki,* 358 U.S. 613 (1959), or to other decisions of various courts of appeals which have applied the *Stromberg* principle in non-constitutional cases. The only case which the Court of Appeals discussed was *United States* v. *Groves,* 122 F.2d 87 (2d Cir. 1941), *cert. denied,* 314 U.S. 670, also involving a mail fraud prosecution in which a branch of the government's alternative theory was not proven. The Court of Appeals said (A. 12):

> "If it [Groves] stands for the broad proposition that each act constituting a part or detail of the scheme charged in a mail fraud indictment, but not essential to the existence of the scheme, must be proved or the entire prosecution fails, then we reject that viewpoint."

The jury verdict of guilty on Count 9 was general and did not specify whether the jury convicted on the medical bill and report charge, the lost time charge or both.

This ruling by the Court of Appeals constitutes the first and primary basis for petitioner's request that this Court grant a Petition for a Writ of Certiorari in this case, as is more fully explained in Part I of the Reasons For Granting The Writ.

2.

Refusal to Allow Dr. Atlas To Testify.

The government's main witness was Dr. William Becker, petitioner's alleged accomplice, who had pleaded guilty and had received probation. Becker's credibility was the heart of the government's case.

Becker's most damaging testimony involved alleged conversations with petitioner in which petitioner demanded that claimants be hospitalized in order to inflate the claim. *Becker testified that in each instance the claimant did not need to be hospitalized.* (R. 105, 202, 219, 227).

On cross examination, Becker admitted that he could not recall the conversations and that he was assuming petitioner requested hospitalization because none of the claimants required it (R. 272-73):

> "Q. Doctor, as you sit there now, I take it you don't remember those specific conversations, do you?"
>
> "A. No, I couldn't. Seven years have gone by, but my recollection is refreshed by these papers, because I know my way of operating, and *I would never put a patient in the hospital unless Mr. Reicin asked me to, and the fact that he was in the hospital and really did not need the hospitalization indicates to me that he called me. It had to be. I did not work any other way.*" (Emphasis added).

Petitioner called Dr. Gerald Atlas to testify as an expert medical witness. The trial judge refused to allow Dr. Atlas to testify on grounds of relevancy. (R. 2496). An offer of proof was made disclosing that Dr. Atlas would have testified that there were medical reasons for hospitalizing all claimants involved in the 11 indictment cases who had been hospitalized, and that in the cases of two claimants, hospitalization was imperative. (R. 2499-2503; 2752-60).

One stated purpose of Dr. Atlas' testimony was to impeach Dr. Becker's testimony that none of the clients required hospitalization and that none would have been hospitalized but for petitioner's insistence. (R. 2498-99). Impeaching Becker would have allowed petitioner to argue that he did not ask Dr. Becker to hospitalize clients. Becker's testimony was the basis of the government's argument that insurance companies were defrauded by receiving unnecessary hospital bills from petitioner. (R. 2957, 2964, 2967-68).

The trial judge was also informed that Dr. Atlas' testimony would be the basis for petitioner's argument of good faith and absence of intent to defraud in the event the jury chose to believe Becker's uncorroborated testimony that petitioner insisted on clients' hospitalization. (R. 2499).

The Court of Appeals held that Atlas' testimony was properly excluded because the impeachment "went to collateral matters." (A. 16). Accepting Becker's unimpeached testimony that petitioner "insisted on hospitalization," the Court of Appeals accused petitioner of "reckless indifference." (A. 16).

REASONS FOR GRANTING THE WRIT

Introduction

The Seventh Circuit's decision in this case is directly contrary to the holding of the Second Circuit Court of Appeals in *United States* v. *Groves,* 122 F.2d 87 (2d Cir. 1941), *cert. denied* 314 U.S. 670 and other well reasoned decisions of the Fourth, Fifth and Ninth Circuits. These cases hold that when a general jury verdict may have been based on alternative grounds of guilt, one of which grounds is unconstitutional, erroneous, or unsupported by the evidence, a conviction must be reversed and a new trial ordered.

Moreover, the decision is contrary to the holding of this Court in *Stromberg* v. *California,* 283 U.S. 359 (1931). Although the Seventh Circuit attempted to distinguish *Stromberg* on the grounds that it involved First Amendment rights, the Seventh Circuit did not discuss the holding of this Court in *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki,* 358 U.S. 613 (1959) which is directly on point.

Faced with multiple charges, as petitioner was in this indictment, petitioner's right to a fair trial requires that he be convicted only upon evidence sufficient to prove the *essential* charges of the crime. In this case, there were two essential charges, only one of which was proven, but the jury was free to convict on either.

In addition, the Seventh Circuit affirmed the District Judge's refusal to allow petitioner to call Dr. Atlas as an expert witness. Dr. Atlas would have not only impeached Dr. Becker, the government's primary witness, but would also have offered substantive evidence on petitioner's theory of the case. Petitioner had the right not only to im-

peach the government's main witness, but also to offer evidence which would tend to disprove a number of the government's charges. By refusing petitioner permission to call an expert witness, the trial court and the Court of Appeals denied petitioner this right.

I.

There Is A Conflict Between The Decision Below And Decisions Of This Court And Several Courts Of Appeals.

The government's case on Count 9 was based upon the charges that petitioner (1) knowingly submitted to Royal Globe Insurance Company a false medical report and bill regarding Eauslin (par. 7 of the indictment; A. 26), and (2) caused Eauslin to be absent from his job in order to inflate his claim (par. 10 of the indictment, A. 27). The trial judge instructed the jury that they could convict petitioner under Count 9 if the jury found the government had proven either charge. *

---

* The trial judge and the attorneys spent considerable time discussing the instructions regarding the jury's ability to convict defendant upon finding beyond reasonable doubt that defendant either (1) knowingly submitted false medical bills and reports to the Royal Globe Insurance Company or (2) knowingly caused Eauslin to absent himself from work in order to inflate his claim. (R. 2829-41). The net result was government's instruction 39, given over defense objections, as follows:

> "A scheme to defraud under the Mail Fraud statute means some plan to procure money or property by means of false pretenses or representations calculated to deceive persons of ordinary prudence. It is not necessary, however, that any insurance company was actually defrauded by the scheme. *Nor is it necessary that the Government prove every one of the pretenses, representations and acts charged in the indictment.* The Government must prove that defendant knowingly participated in such plan, and that such representations were made by him, or his agents, knowing they were false, and with intent to defraud." (Emphasis added) (A. 11).

The government admitted on appeal and the Seventh Circuit found that the government did not make a *prima facie* case with respect to the "lost time" charge. (A. 9).

It has long been the law that when a case is submitted to the jury on alternative grounds of guilt, one of which is unconstitutional, erroneous, or unsupported by the evidence, a conviction must be set aside and a new trial is required. This doctrine was enunciated by this Court in *Stromberg* v. *California*, 283 U.S. 359 (1931), where this Court reversed a conviction because it could not determine from the record whether the defendant was convicted on a constitutional ground or an unconstitutional ground. (283 U.S. at 368). *

Contrary to the opinion of the Seventh Circuit, this rule of law is not restricted to First Amendment cases. In *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki, supra*, the jury had been charged that it could hold the ship owner liable for a wrongful death act claim under either the doctrine of unseaworthiness or the doctrine of negligence. This Court determined that the doctrine of unseaworthiness was inapplicable to the facts of the case. The Court held that since there was no way of knowing whether or not the claim of unseaworthiness was the basis for the verdict, the case must be reversed and remanded for a new trial. (358 U.S. at 618-19)

This Court has recently made clear that the *Stromberg* rule, applied in *Halecki*, was not limited to First Amendment cases. In *Eaton* v. *City of Tulsa*, 94 S.Ct. 1228, 1230 (1974), this Court stated: "and this principle is not limit-

---

* See also *Bachellar* v. *Maryland*, 397 U.S. 564, 571 (1970); *Leary* v. *United States*, 395 U.S. 6, 30-32 (1969).

ed, nor should it be, to cases in which the conviction may have been based on protected speech."

The *Stromberg* rule has been applied in numerous criminal cases decided by the circuit courts. A case directly on point is *United States* v. *Groves*, 122 F.2d 87 (2d Cir. 1941). The defendants were charged with violating the mail fraud statute. "Each count of the indictment set forth three separate frauds, alleged to have been practiced on G.I.C. pursuant to the scheme." (122 F.2d at 89). On appeal, the Second Circuit held that sufficient evidence had been introduced to submit the case to the jury as to the first fraud, but that the government did not make a *prima facie* case against defendant George Groves as to the second and third frauds. The court held (122 F.2d at 91):

> "But there was no further evidence at all of his connection with the procurement of the two fraudulent commissions, and under the circumstances we feel that a jury would not be justified in finding that he participated in either of them. But if it could not find that he participated in both, his conviction must be reversed; for it was allowed, over objection, to consider together his guilt in respect of each of the three frauds alleged, and hence each must be proven [Citing cases.]"

In cases other than mail fraud, the *Stromberg* rule has been applied consistently. In *United States* v. *Meriwether*, 440 F.2d 753 (5th Cir. 1971) a tax evasion conviction was reversed where the jury was allowed to convict under either the "specific item" or the "net worth" method in a situation where the government had failed to make a *prima facie* case as to the net worth method. (440 F.2d at 757). The Court's attention is also directed to *United States* v. *Shuford*, 454 F.2d 772, 780 (4th Cir. 1971) (false statement and conspiracy prosecution); *Beck* v. *United States*, 298 F.2d 622, 630-31 (9th Cir. 1962) (tax evasion

prosecution); *United States* v. *Driscoll,* 449 F.2d 894, 898 (1st Cir. 1971) (conspiracy prosecution).

The Seventh Circuit has rejected application of this rule to mail fraud cases. It erroneously refused to follow the *Groves* decision and limited the *Stromberg* rule of law to First Amendment cases. In holding that the rule was not applicable to mail fraud prosecutions, the Seventh Circuit stated: [T]he challenged portion of this indictment was merely an illustrative aspect of an overall scheme and did not constitute *per se* a separate offense or separate legal theory." (A. 12). This is simply not an accurate statement of the case. The prosecuting attorney argued the lost time charge as a separate basis for a finding of guilty and emphasized it exclusively during his argument on Count 9.* The trial judge gave instructions to the jury to the same effect. The case, as described by the Court of Appeals, involved a "scheme to defraud . . . by preparing and submitting false and exaggerated medical reports and bills to the companies and by causing claimants 'to absent themselves from employment to increase their alleged damages.'" (A. 2).

The same problem arises repeatedly in mail fraud prosecutions. Defendants are often faced with a variety of charges, some of which go unproven. In this case, defense counsel attempted to limit the charges consistent with the proof and the arguments of the parties. Prior to trial and at the close of the government's case, the trial judge struck several charges which were insufficient in law or fact.**

---

* The prosecutor's closing argument relating to Count 9 is set forth in the appendix to this petition. (A. 29-30).

** The trial judge struck the lost time charge from Counts 3, 4, 5, 6 and 10 at the close of the government's evidence. The judge refused to strike it from Count 9.

Nevertheless, the trial judge instructed the jury that the government did not have to prove "every one of the pretenses, representations and acts charged in the indictment." Accordingly, the jury was free to convict on either the medical bill issue or the lost time issue. *

The Seventh Circuit seemingly agrees that the government must prove "essential" components of the scheme (A. 12), but its decision effectively forecloses the opportunity to assure that the jury has convicted on this basis. (The Court reproached the district judge for performing the useless act of striking paragraph 10 from five of the counts.) (A. 13). There were two "essential" elements as even the Court of Appeals recognizes. (A. 2). Whether the medical bill and report charge and the lost time charge are considered essential elements of one scheme or as two separate schemes is irrelevant. The rule set forth in *Stromberg* and the other cases cited by petitioner should have been applied.

Given the salutary effect of the rule of law enunciated in *Stromberg* and applied in *Halecki*, there simply is no reason to reject its application in mail fraud cases as the Seventh Circuit has done.

II.

A New Trial Was Required Because The Trial Court Committed Prejudicial Error In Refusing To Allow Petitioner To Call Dr. Atlas As An Expert Witness.

During petitioner's presentation of evidence, Dr. Gerald Atlas, an eminently qualified physician and surgeon, was

---

* Conviction on the lost time issue would violate the Due Process Clause of the United States Constitution since there was admittedly no proof on this issue. See *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960).

called to testify. (R. 2487-93). Dr. Atlas had reviewed all pertinent medical records of petitioner's clients who had been hospitalized and was prepared to testify regarding, among other things, their need for hospitalization. (R. 2499-2503; 2752-60).

Dr. Atlas' testimony would have directly impeached Dr. Becker's statement that *none* of the clients required hospitalization. Dr. Atlas, in an offer of proof, stated that each of the clients hospitalized in fact should have been hospitalized and that in two instances, the need for hospitalization was an absolute medical necessity.* Moreover, Becker admitted during his examination that he could not actually recall conversations with petitioner wherein petitioner "demanded" that clients be hospitalized but insisted that the conversations took place because the clients "really did not need the hospitalization [which] indicated to me that he called me." (R. 272-73). Consequently, if Atlas had been allowed to testify regarding the need for hospitalization, he not only would have impeached Becker with respect to the need for hospitalization but would have destroyed an important part of Becker's testimony.

Agreeing with the government, the Court of Appeals stated that Atlas' testimony was properly excluded because the impeachment portion "went to collateral matters." Perhaps the Court of Appeals' holding would be accurate if the government had indeed treated this matter as "collateral." However, the government elicited Becker's testimony regarding alleged demands by petitioner that clients be hospitalized a total of five times and argued to the jury that this was definitive proof of petitioner's knowledge of the "scheme." (R. 2964).

---

* Based on Atlas' testimony, petitioner could have argued and the jury could reasonably have inferred that Becker deliberately perjured himself. (R. 2501-02; 2759).

It is elementary that the testimony of a witness may be contradicted on a material point by the testimony of another witness. See *United States* v. *Halperin*, 441 F.2d 612, 617 (5th Cir. 1971). When the trial court refused to strike certain portions of Dr. Becker's direct testimony, including testimony that petitioner insisted on hospitalization, petitioner was entitled to meet and impeach Becker's testimony.

As stated above, Dr. Atlas' testimony was also relevant on the issue of whether and how severely the hospitalized clients were injured. The government relied on "unnecessary" hospital bills as evidence of petitioner's fraud since these hospital bills were forwarded to insurance companies to substantiate the clients' claims. For this reason, petitioner had a right to show that the hospitalization was required and that the insurance companies were not defrauded. See *Coleman* v. *United States*, 167 F.2d 837, 840 (5th Cir. 1948); *Norcott* v. *United States*, 65 F.2d 913, 919 (7th Cir. 1933).

The Court of Appeals answered this argument of petitioner by stating that the success of a scheme to defraud need not be shown and that defendant would be guilty of mail fraud even if the insurance company had not lost any money. However, this argument avoids the real issue. Since the government attempted to show that the hospitalization was unnecessary and argued this prejudicial fact to the jury, it was certainly proper for petitioner to introduce evidence that the hospitalization had been required and that the insurance company paid only for services which were properly rendered.

Finally, in the event that the jury chose to believe Becker's testimony that petitioner had insisted on hospitalizing the clients, Dr. Atlas' testimony was material to the issue

of petitioner's good faith, and conversely lack of intent to defraud. To the extent that clients in fact required hospitalization, the jury could have found that petitioner did not intend to defraud. In mail fraud cases, good faith is a complete defense. *Durland* v. *United States,* 161 U.S. 306, 313-14 (1896); *Beck* v. *United States,* 305 F.2d 595, 599 (10th Cir. 1962).

The question of good faith and conversely lack of intent to defraud is particularly a jury question. A liberal policy as to the admission of evidence on questions of intent assures that the jury will have all relevant facts upon which to reach its decision. See, *e.g., United States* v. *Diamond,* 430 F.2d 688, 692 (5th Cir. 1970); *United States* v. *Shavin,* 287 F.2d 647, 654 (7th Cir. 1961).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

THOMAS P. SULLIVAN
ALAN L. METZ
Attorneys for Petitioner

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1973 — September Session, 1973

No. 73-1057

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD E. REICIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 82
Thomas R. McMillen, *Judge.*

Argued September 12, 1973—Decided May 28, 1974

Before CASTLE, *Senior Circuit Judge,* and FAIRCHILD and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* An eleven-count indictment charged appellant Edward Reicin, an attorney, with mail fraud, 18 U.S.C. §1341.[1] Defendant and Dr. William Becker al-

[1] The statute provided:

"§1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail

legedly had devised and carried out a scheme to defraud insurance and other companies [2] in personal injury cases by preparing and submitting false and exaggerated medical reports and bills to the companies and by causing claimants "to absent themselves from employment to increase their alleged damages." Each count pertained to a different personal injury case handled by the defendant or lawyers in his office, and each count alleged a specific mailing with regard to the claim involved in that count.[3]

A jury convicted Reicin on Count 9, which concerned the mailing of a fraudulent document to the Royal Globe Insurance Company, and acquitted him of the ten other counts. On this appeal, defendant seeks (1) the reversal of his conviction on the ground of insufficiency of the evidence, or (2) a remand for a new trial on Count 9 because

---

(footnote continued)
matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[2] Each count involved a different mailing; however, one scheme and artifice to defraud various companies was charged, "including but not limited to: Aetna Insurance Company, Allstate Insurance Company, Chicago Transit Authority, The Hanover Insurance Group, Horace Mann Insurance Group, Inter-Insurance Exchange of the Chicago Motor Club, National Emblem Insurance Company, Northwestern Security Insurance Company, Royal Globe Insurance Company and Unigard Insurance Company. . . ."

[3] The use of the mails aspect of the case has not been challenged on this appeal.

of supposed procedural irregularities at trial. Reicin also requests a remand for a hearing on his motion to quash the indictment.

Factual Background

Count 9 concerned the claim of Philip Eauslin, a traveling commission salesman, whose automobile was struck from the rear by a truck on July 5, 1967. A few days after the accident, Eauslin and his family drove the repaired automobile to Florida for a previously planned vacation. While in Florida, Eauslin felt pain in the small of his back. He had experienced such pain sporadically for some years prior to the July 5th accident. As he had originally intended, Eauslin remained in Florida for two weeks, during which time he did not seek the services of a doctor.

After returning from vacation, Eauslin mentioned the accident to his supervisor at his place of employment. That individual recommended that Eauslin consult the defendant, whose firm had done some work for the company. Eauslin did so. In his conversation with Reicin, he told him about the accident and said that, although he had some discomfort, he probably had had the same symptoms before the accident. He also mentioned that he had just returned from a vacation trip to Florida. Reicin suggested that he see a doctor; when Eauslin replied that he had no family physician, defendant arranged for him to see Dr. Becker.[4]

---

[4] At the time of Reicin's trial, Dr. Becker, the Government's primary witness, had been convicted of mail fraud. He had prepared false medical bills and reports and had sent them to divers attorneys so that they could obtain inflated settlements from insurance companies. Becker was given two years' probation with the understanding that he tell the truth in any further proceedings regarding the mail fraud cases in which he had participated.

Eauslin testified that he visited Dr. Becker's office only one time and that the doctor briefly examined Eauslin's back but gave him no treatment or medication. He also sent him to an X-ray clinic.

According to Dr. Becker, after Easulin had come to his office, defendant telephoned the doctor and requested the card on which Becker had listed the number of visits supposedly made by Eauslin. Reicin had stated that he wanted the card because there was a subpoena for Becker's records and defendant wanted to make certain that the cards "looked all right." Dr. Becker's bill for treatment of Eauslin amounted to $185 and falsely indicated that Eauslin had seen the doctor eleven times. Becker refunded 25 percent of the bill to the defendant in cash.

Count 9, like Counts 2-8 and 10 and 11, realleged by reference all the allegations of the first count, which described one scheme or artifice to defraud.[5] The evidence adduced at trial established the following course of conduct. Dr. Becker had known the defendant since 1961, and between 1965 and 1969, he handled approximately 83 to 90 cases with Reicin. He testified that he looked to the defendant for payment of some of the medical bills involved in the indictment. Prior to sending each of the bills to Reicin, Dr. Becker would receive a letter from the defendant asking for the bills. After Reicin would pay the bills, the doctor would kick back 25 percent of each payment to the defendant. Dr. Becker testified that each of the bills and medical reports he had prepared was false and exaggerated and that he had had conversations with the defendant about their inaccuracy. Reicin had expressed concern that the fraud might be exposed:

---

[5] Prior to trial, the court struck from the indictment allegations that defendant Reicin had submitted false automobile repair bills to the various companies and that he had defrauded his clients.

"[T]here was a lot of heat in the streets" and "[there were] investigations going on about personal injury cases."

Although Reicin voiced concern about the discrepancy between the number of visits mentioned on the bills and the actual number of visits that claimants paid Dr. Becker, he neither warned the various companies about the misinformation nor ceased sending clients to Dr. Becker for examination for insurance claim purposes. Indeed, Becker testified that in 1965, after Reicin had told the doctor that he was worried that the medical bills smacked of fraud, Reicin simply suggested that the manner of his payment be changed. Previously, Reicin would send Becker 40 to 60 percent of the amount of the bill. Reicin proposed that he would send the doctor the full amount of the bill by his, Reicin's, check and thereafter Becker would refund 25 percent of the amount in cash to Reicin. Apparently because of the increase of the percentage to the doctor, he was to pay the resultant income tax based on the full amount of the bills. Further, Dr. Becker also testified that the defendant had demanded that certain claimants-patients be hospitalized.

Former clients of Reicin, claimants, corroborated much of Becker's testimony about Reicin's pattern of behavior and his knowledge that the reports submitted to the various companies contained misrepresentations. For example, client Carolyn Lovell stated that she had told Reicin that if she went to the hospital she might lose her job. Reicin replied that she was "working for peanuts anyhow" and that she should go to the hospital. He telephoned a Dr. Villate and told him to "throw Mrs. Lovell in the hospital." After Reicin gave Mrs. Lovell her settlement, he warned: "[N]ot a word of this to anyone. If anything happens, come to me." When claimant Carrara,

after signing the settlement agreement, questioned the amount of the doctor's fees, defendant replied that it was normal for ten or twelve visits. Carrara stated that he had visited Becker only once or twice. Reicin then responded that, nevertheless, "that is what we used in the settlement."

At the close of the Government's case, the trial court struck paragraph 10, concerning "lost time," from Counts 3, 4, 5, 6, and 10. However, the court denied the defendant's motion for judgment of acquittal on Count 9 or, in the alternative, that paragraph 10 be stricken in relation to Count 9.

Sufficiency of the Evidence

Claimed Total Failure of Proof

Reicin first contends that the Government produced no evidence, direct or indirect, that he was aware that Dr. Becker's report and bill on claimant Eauslin were fraudulent. He further maintains, contrary to the district court's position in its post-trial memorandum opinion, that the evidence pertaining to the counts on which he was acquitted may not be the basis for inferences against him on Count 9.

Second, Reicin asserts that the Government failed to prove another element of the scheme as described in the indictment, namely, that Becker and the defendant caused clients, including Eauslin, to absent themselves from employment to increase their alleged damages. The prosecutor, Reicin declares, recognized the weakness of his case in this respect and therefore in his closing argument injected the "new and different [lost time] theory" that, without Eauslin's knowledge, the defendant and Eauslin's employer, Mr. Brill, submitted a letter to the Royal Globe

Insurance Company indicating that the claimant had taken off more time than he in fact had. This supposedly material alteration of the indictment assertedly was improper and its substance unproved.

This assault by defendant on his conviction stems primarily from his narrow view of a mail fraud charge, a view which we do not share.

> "The defendants' arguments [in this mail fraud case] as to sufficiency of the evidence on the substantive counts attack the credibility of witnesses, disregard the fact that guilt can be proven by circumstantial evidence, . . . and generally ignore the function of the jury in criminal trials. Defendants do not, in their briefs, look at the evidence as a whole, or in the light most favorable to the Government, but rather isolate various bits of testimony and argue that each was insufficient to support the verdicts. However, the evidence presented concerning the various accidents overlaps and cannot be viewed in a vacuum." *United States* v. *Hutul*, 416 F.2d 607, 617 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

The jury's acquittal of defendant of ten of the eleven counts charged does not justify the conclusion, as Reicin implies, that the jury perceived no overall scheme but nevertheless irrationally convicted defendant on Count 9. In finding Reicin guilty on that count, the jury, we are persuaded, did look at all the evidence, the approach the Government had adopted at trial. In his closing argument in particular, the prosecutor had developed the theme that Reicin and Dr. Becker had devised a successful formula for defrauding companies in accident cases by inflating the "specials" and that they had employed this preconceived plan repeatedly, only varying it slightly once or twice as the circumstances required. In his analysis of the verdict, the defendant fails to take into account

the possibility that the jury might have been exercising "its historic power of lenity," *United States* v. *Carbone*, 378 F.2d 420, 423 (2d Cir. 1967), *cert. denied*, 389 U.S. 914. In *United States* v. *Fox*, 433 F.2d 1235, 1238 n. 22 (D.C. Cir. 1970), the court pointed out "the judicially recognized fact that juries frequently convict on some counts but acquit on others, not because they are unconvinced of guilt, but simply because of compassion or compromise."[6]

Count 1, which each subsequent count of the indictment realleged, described one scheme or artifice to defraud. Its separate paragraphs were enumerations of certain illustrative elements or characteristic patterns of the scheme. (Count 1 and Count 9 are set out in the Appendix to our opinion.) Count 9 specified one instance of the perpetration of the continuing plan. Dr. Becker's testimony, which Reicin does not credit but which the jury

---

[6] While we decline to speculate as to the reason the jury selected the indictment count involving the Eauslin incident for its sole conviction, we do note certain significance given to this count in the final argument of counsel for Reicin:

> "Mr. Hoffman, who is a very fine lawyer and does a good job for the government, he points out to you that the Hernandez incident put Reicin on notice, that there is something wrong with Becker's bills. But he still continued to send clients to Becker.
>
> "Do you know how many of these cases went to Dr. Becker after the Hernandez incident, ladies and gentlemen? One. O-n-e, one, the Eauslin case, where Eauslin came in and he practically fought with him about whether he had a family doctor and Reicin said, 'Go see your family doctor.' And eventually Reicin sent Eauslin to Becker. One case involved here in which Reicin sent a client to Becker after the Hernandez incident, as you will see when you examine these pieces of paper."

apparently did find persuasive, indicated that the defendant knew that the doctor was regularly falsifying the bills of Reicin's accident clients, including those for Eauslin. His protestations notwithstanding, Reicin continued to refer persons to Becker and to share the monies resulting from that consultation. Reicin's primary concern was that the misrepresentations would be discovered. Becker's testimony and that of the various clients provided an adequate basis for the conclusion that Reicin knew of the misrepresentations, that he and Becker had developed a unitary scheme and had participated in that scheme, and that the two had handled the Eauslin claim in accordance with the established scheme.

Although we find no merit to the claim that there was no continuing, overarching scheme or that Reicin did not participate knowingly in it, we do agree that the Government's inability to establish that the defendant and Becker caused Eauslin to take unnecessary time off from his job weakened the Government's case. The issue is whether the lack of such proof, despite the presence of the other elements of the scheme as alleged in the indictment, vitiates the conviction on Count 9.

We hold that it does not. "[I]n most mail fraud prosecutions, there are numerous instances of allegedly illicit conduct, all of which need not be proved to sustain a conviction." *Anderson* v. *United States*, 369 F.2d 11, 15 (8th Cir. 1966). *Cf. Martin* v. *United States*, 404 F.2d 640, 643 (10th Cir. 1968). As the district court stated in its post-trial opinion, "[a]s in a conspiracy case, it is necessary to prove at least one but not necessarily each of the specific acts to sustain each count." This is not a case of a crucial, substantial, prejudicial variation between indictment and proof; defendant and Becker handled the Eauslin claim

substantially as they had the other claims, although perhaps their pecuniary goal was a trifle more modest this time.

In regard to Reicin's related contention, that the prosecutor in his closing argument substituted a "different lost time theory," we place a different construction on the prosecutor's remarks. Eauslin did not have an exhaustive recollection of his conversations with the defendant or of his work schedule following the accident, but his testimony was sufficiently definite to permit the prosecutor to argue that certain inferences could be drawn from the seeming discrepancy between that testimony and the Eauslin lost-time exhibits. The Government was not limited to proving only those details of the scheme alleged in the paragraphs of Count 1 but could also draw additional inferences from the evidence relevant to the defendant's criminal intent. The jury heard the somewhat equivocal evidence on this point and was free to disregard the prosecutor's assessment of it. We note that Reicin did not object to the argument at the time and that the trial judge instructed the jury that counsel's comments were not evidence.

Claimed Partial Failure of Proof

Reicin interprets the charge against him as consisting of two "branches": (1) the knowing submission to the Royal Globe Insurance Company of a false medical report and a false bill for the Eauslin claim, and (2) causing Eauslin to be absent from his job in order to inflate his damages. Under this construction of the case, the defendant asserts, in an alternative argument, that if the evidence was sufficient to prove only one "branch," then he is at the very least entitled to a new trial. More specifically, Reicin's argument is as follows: (a) Count 9

was submitted to the jury on alternative grounds (1) and (2), and the jury was instructed that it could convict defendant under *either* "branch";[7] (b) the Government failed to adduce sufficient evidence against the defendant, the inadequacy particularly apparent as to the lost-time ground; therefore, (c) the general verdict of guilty cannot stand because the jury may have based its verdict on the "obviously" unproven ground.

While what we have already said on the nature of a mail fraud case is probably sufficient to dispose of this secondary argument, we will consider the authorities to which our attention has been directed by Reicin.

He claims to find support in *Stromberg* v. *California*, 283 U.S. 359 (1931), and *United States* v. *Baranski*, 484 F.2d 556 (7th Cir. 1973). However, those cases involved a special statutory problem not present here. In each case, there was a basis for belief that the convictions could have rested on statutory sections or clauses which the respective reviewing courts held to be constitutionally in-

---

[7] The instruction to which Reicin refers (No. 39) provided:

> "A scheme to defraud under the Mail Fraud statute means some plan to procure money or property by means of false pretenses or representations calculated to deceive persons of ordinary prudence. It is not necessary, however, that any insurance company was actually defrauded by the scheme. Nor is it necessary that the Government prove every one of the pretenses, representations and acts charged in the indictment. The Government must prove that defendant knowingly participated in such plan, and that such representations were made by him, or his agents, knowing they were false, and with intent to defraud."

Defendant finds the next-to-last sentence of this instruction improper. He had unsuccessfully opposed the giving of the instruction at trial.

valid. Because the trial courts had instructed the juries that they could convict on the basis of any one of the several statutory bases involved and the juries had returned general verdicts, the grounds for the convictions were unclear; the juries might have convicted under the parts of the statutes which infringed First Amendment rights. In the case at bar, there is no danger that the defendant might have been found guilty for having engaged in conduct that the Government cannot constitutionally prohibit. Further, the challenged portion of this indictment was merely an illustrative aspect of an overall scheme and did not constitute per se a separate offense or separate legal theory.

The defendant also relies on *United States* v. *Groves,* 122 F.2d 87 (2d Cir. 1941), *cert denied,* 341 U.S. 670, which he characterizes as the "closest [case] on the facts." In *Groves, supra* at 89, the court stated that "[e]ach count of the indictment set forth three separate frauds, alleged to have been practiced on G.I.C. pursuant to the scheme." The court affirmed the conviction of one of the two appellants, but reversed and remanded the case against the second appellant. It ruled that there had been no evidence of that defendant's participation in the second and third frauds. Furthermore, the court disapproved of the use against the defendant of certain "extremely prejudicial" hearsay testimony, upon which, the court noted, the jury might have based its finding of guilt.

We do not find *Groves* persuasive here. If it stands for the broad proposition that each act constituting a part or detail of the scheme charged in a mail fraud indictment, but not essential to the existence of the scheme, must be proved or the entire prosecution fails, then we reject that viewpoint. Whatever the factual situation in

Groves, the present case consists not of a series of disconnected swindles or of frauds that may have had merely a common actor or stage but of a continuing, unitary scheme wherein each participant generally adhered to a certain course of conduct in regard to the various victims. *Cf. United States* v. *Sheehan,* 428 F.2d 67 (8th Cir. 1970), *cert. denied,* 400 U.S. 853; *Bliss* v. *United States,* 354 F.2d 456 (8th Cir. 1966), *cert. denied,* 384 U.S. 963. In sum, we do not share Reicin's interpretation of the prosecution's case. The Government argued to the jury that Reicin and Becker had concocted one basic scheme; what Reicin labels as "alternative theories" are specifications of the participants' fundamental modus operandi, which they modified somewhat as circumstances warranted.

Notwithstanding defendant's argument to which we have adverted, Reicin agrees in his brief "that it was not necessary for the Government to prove each of the various fraudulent acts alleged in the indictment."

Our conclusion is not changed by the fact that the trial judge declined to strike Paragraph 10 from Count 9, which paragraph was incorporated by reference from Count 1 and which dealt with that part of the general scheme whereby the allegedly injured person absented himself from his place of employment. The trial judge did strike this reference-incorporated paragraph from five other counts. Because it was not necessary for the Government to prove each of the fraudulent acts constituting the scheme to defraud, the striking of the paragraph from some of the counts was an unnecessary action, being nothing more than a judicial comment on factual proof and has no other significance in this particular case. We will not assume that the jury based a verdict on nonexistent proof, if, as defendant contends, there was no

proof; rather, we conclude that the jury did decide that there was sufficient evidentiary proof that the defendant and Dr. Becker had engaged in a scheme to defraud. We cannot say that the jury was incorrect in its decision.

Alleged Trial Errors

The Doctors' Testimony

Reicin maintains that the trial judge committed prejudicial error (1) by refusing to strike Dr. Becker's "fabricated direct testimony about conversations with defendant," and (2) by refusing to allow Dr. Gerald Atlas, whom defendant wished to call as an expert witness, to testify.

As to each of the counts in which the client involved was hospitalized, Dr. Becker testified to conversations he had had with defendant Reicin wherein Reicin advised him to hospitalize the client. The defendant contends that cross-examination of Dr. Becker revealed that, in each instance, either the doctor had no present recollection of the particular conversation and his files contained no notes concerning such conversation or that, where Becker did have pertinent notes, he simply relied on what was stated in those notes without having any present recollection at all. In both kinds of situations, Dr. Becker assertedly fabricated or, at least, embellished a substantial part of the supposed conversations he had had with Reicin.

The notes on which Dr. Becker relied at trial had been admitted into evidence as business records and as past recollection recorded. Reicin claims that "[a]lthough the notes remained admissible . . ., the oral testimony should have been stricken. . . . [T]here was no evidentiary basis for [Dr. Becker's] testimony."

The defendant relies heavily on Dr. Becker's responses to questions on cross-examination about his recollection of particular conversations with Reicin. The exchanges between defense counsel and Dr. Becker are ambiguous. It is not clear that the witness understood counsel's questions about his "actual recollection" "as you sit there now." He rather clearly did not have recollection of many of the incidents independently of his recorded memoranda, but, after looking at these memoranda, he did testify as to the incidents. Because of the combination of "past recollection" and "recollection refreshed," the trial judge would not have been justified in striking Dr. Becker's testimony. *See generally* C. McCormick, Evidence, ch. 30 (2d ed. 1972). It was appropriate for the jury to determine Dr. Becker's credibility and the weight to be given to his testimony, which pertained to a few of several thousand patients he had seen several years before. Although it seems unlikely that Dr. Becker would have had an independent recollection, doctors customarily depend upon notes made during patient contacts for the purpose of refreshing their recollections concerning the patient. From hearing and observing the witness, the jury could decide whether he was fabricating or whether he was testifying with recollection refreshed.

Dr. Becker's testimony on direct examination that in his medical opinion none of the patients had required hospitalization and that he would not have hospitalized them absent Reicin's requests undoubtedly helped the Government's case. The defendant wished to counteract this deleterious evidence through the expert testimony of Dr. Gerald Atlas, to whom the defendant had shown the hospital records of each hospitalized claimant. In an offer of proof, counsel indicated that Dr. Atlas would have

stated, if he had been allowed to testify, that, based upon a reasonable degree of medical certainty, he would have hospitalized those persons if they had been his patients. This counter testimony, Reicin argues, would have (1) impeached Dr. Becker's credibility, (2) undermined the basis for an inference of fraud upon the companies involved, and (3) circumstantially shown Reicin's good faith.

The trial court had refused to permit Dr. Atlas to testify on the ground that the proposed testimony was irrelevant. We, too, conclude that this supposed "rebuttal" testimony went to collateral matters. The district court exercised its discretion properly.

This case is not a personal injury action. The primary question at trial was whether Reicin had knowingly participated in a scheme to misrepresent information to and defraud insurance and other companies through use of the mail. Consequently, the schemers' intent at the time they acted was crucial. Dr. Becker testified that but for Reicin's insistence he would not have hospitalized certain of the clients. The record does not show that Reicin, a lawyer, was competent to contradict Dr. Becker's judgment on medical grounds. Nor was there evidence that the defendant consulted other doctors on the question of hospitalization. Yet Reicin insisted on hospitalization. His intent to defraud does not turn on whether some of the clients "actually" needed such treatment; it is enough that the defendant thought at the time that they did not or that he made the decision to hospitalize for the purpose of making a better case without regard to whether there was need therefor. "One who acts with reckless indifference as to whether a representation is true or false is chargeable as if he had knowledge of its falsity." *Irwin* v. *United States*, 338 F.2d 770, 774 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965).

Further, the success of a scheme to defraud, that is, whether the victim lost money because of it, is not a prerequisite to a conviction for mail fraud. *United States* v. *George,* 477 F.2d 508 (7th Cir. 1973), *cert. denied,* 414 U.S. 827; *Blachly* v. *United States,* 380 F.2d 665, 672-73 (5th Cir. 1967).

In sum, Dr. Atlas's proposed testimony would not serve to negate the existence of this part of the scheme. The existence of the scheme is the relevant proof requirement. *Cf. United States* v. *Joyce,* ..... F.2d ....., Nos. 73-1014, 73-1015, 73-1016 (7th Cir., May 9, 1974), slip op. at 18.

The Prosecutor's Closing Argument

The defendant next asserts that he was denied a fair trial because the prosecutor during closing argument supposedly (1) commented, albeit indirectly, on Reicin's failure to take the stand, (2) accused a witness of perjury and Reicin of suborning that perjury, and (3) inflamed the jury against the defendant.

We have examined the prosecutor's closing argument, paying particular attention to those passages to which the defendant has cited us. Final arguments in this case, occupying in excess of 150 pages of the transcript, can scarcely be labeled as laconic. The particular phrases which the defendant now attacks as being comments on the defendant's failure to take the witness stand were typified by: "Reicin says, through other witnesses, . . ." and "for some reason that only Reicin knows. . . ." While the first of these was used on several occasions and perhaps is an inartful locution for a prosecutor who should not only refrain from commenting on the failure of a defendant to take the witness stand but should guard against the appearance of doing so, nevertheless, in the

context of the extensive argument in this case we do not read in these introductory remarks the illative meaning that the defendant finds.

The first phrase was used in reference to that to which the defendant's witnesses testified, and the second phrase taken in context referred to defendant's intent in effecting a change of modus operandi. We cannot say from the record that the "language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *United States* v. *Lyon,* 397 F.2d 505, 509 (7th Cir. 1968), *cert. denied,* 393 U.S. 846.

Further, not only did the trial court instruct the jury on the matter, but Reicin's counsel in his final argument said, "You will also be told that you must not and you may not discuss or consider the fact that the defendant did not testify in this case." The fact that he did not testify was no secret. Impropriety would only arise from the suggestion that the failure somehow should be construed against the defendant.

Finally, as in *Lyon,* there was no objection to the use of these statements. We are not unmindful of the disadvantages of interrupting opposing counsel's argument, but we are of the opinion that if the claimed transgression was so egregious as to constitute plain error it well should have, and probably would have, triggered an interruptive objection.

The prosecutor's remarks about perjury related to the testimony of defense witness Philip Wertz, an attorney employed by the defendant's firm from 1966 to 1968. Wertz's account of certain aspects of the Hernandez trans-

action differed from that of Government witness Thomas Fahey, an insurance adjuster. In summarizing Wertz's testimony, the prosecutor stated:

> "Now I haven't the slighest idea, but I have got a good imagination and maybe I can conjure something up in my mind to that effect—but nonetheless, I don't really know what inducements Reicin could have used to prevail upon Wertz to engage in that incredible state of perjury."

The prosecutor continued:

> "But today, for fear that maybe some future employer might not believe him, he has got to go back and do for you in front of you today Mr. Reicin's bidding, and that bidding, unfortunately, includes and encompasses what I consider to be some pretty severe perjury.
>
> "Let's take another example about Mr. Wertz, a man who I really feel sorry for because I am sure until he had to appear in this courtroom he was a relatively clean individual."

While it may be playing with words and while, despite the native intelligence of jurors, they might have difficulty in distinguishing between a forthright statement in argument that a witness has committed perjury and an assertion such as the one made by Reicin's counsel, "Now I am not saying these people are guilty of deliberate perjury," nevertheless, the courts have viewed the direct accusation of the crime of perjury with considerable disfavor. See, *e.g.*, *Weathers* v. *United States*, 117 F.2d 585 (5th Cir. 1941).

Again, however, we do not look at the statement in a vacuum but in the context of the particular trial. We have already adverted to the extensive nature of the final argument. We do not mean to suggest that a three-

week trial would have called for a shortened summation, but we do find some significance in the relationship of the size of the craft to the body of the water it occupies. Secondly, on the first reference to perjury there was no objection but the prosecutor continued reviewing the questioned testimony. Three pages later in the transcript we find the second use of the word "perjury." Again there was no objection, and it was not until the end of the last paragraph quoted above that there was an objection. Even then the primary thrust of the objection was that the prosecutor had misstated the testimony. The trial judge responded that the jury would have to decide what the facts were. Again, counsel referred to the misstatement and finally said, "He is also accusing Mr. Wertz of perjury just because he doesn't agree with Mr. Fahey." After further reference by the court to the jury determining the facts, defense counsel stated, "I do object to the prosecutor misstating the testimony." There was neither a motion to admonish nor a motion for a mistrial. Further, there was no objection to the intimation that defendant had suborned perjury. In its instructions, the court did advise the jury that "arguments of counsel are not evidence."

From the record it is clear that Reicin's counsel competently, effectively, and vigorously represented him. Yet he now seeks to have us reverse the judgment of conviction on a basis that he barely recognized during the course of the trial.

We have little difficulty in discerning the probable cause of the minimal nature of the objection. The closing arguments had few anacreontic attributes. In less formal terms, the arguments of both counsel were free-swinging and hard-hitting. In the final argument of defense counsel,

we note the following references to the verity of Government witnesses:

> "We agree that Dr. Becker was engaged in a scheme, a fraud. We agree that Dr. Becker is a liar, a cheat, a charlatan. . . . Because Dr. Becker hasn't got the slightest—not the slightest concern for the truth. . . . Dr. Becker himself, the great witness, the government's puppet. . . . Now Dr. Becker, he is paying his debt to the government. . . . Now I am not saying these people [witnesses other than Dr. Becker] are guilty of deliberate perjury. . . . That man came into this court and took that stand with one purpose in mind, to hurt Ed Reicin. . . . I will tell you I don't believe Becker. Becker deliberately pretended actual recollection of an event that never happened, never happened, to hurt Ed Reicin, for the government. . . . Another deliberate lie—this is a little thing, but it goes to show you the nature of the man you are dealing with. . . . Now Fahey says he didn't tell about that. And I find that hard to believe. . . ."

In addition, while not directly accusing the Government of suborning perjury, defense counsel made several references to the method in which the investigating agents called in Reicin's clients and to false statements clients had signed by the time they had left the governmental offices.

We decline under the circumstances here involved to find that the two references to perjury are sufficient to mandate a reversal.

Finally, the defendant complains that by the following comments during rebuttal the prosecutor overstepped the permissible bounds of advocacy:

> "Once we are talking about the fraud and who pays for it, don't go back into the jury room and feel that the victims are the insurance companies, because I assure you, whatever the insurance com-

panies pay out, they get right back again through premiums from you, from me and from anybody else who has to pay for automobile insurance and for the risks that you take under that particular premium. And one of the risks that I don't want to have to take and that any driver who has to pay automobile premiums wouldn't want to take, are the risks of fraud that people like Mr. Reicin perpetrate against the insurance companies that you and I have to pay for. That is one point.

. . .

"The type of law that Mr. Reicin was practicing during 1965, during 1966, '67 and '68, you have got a chance to stop today. Because if anybody else is doing it, if you tell they can't do it as loudly and as thoroughly as you can eleven times over, ladies and gentlemen, somehow it is going to stop."

After this last comment, counsel objected "to this line of argument." The court sustained the objection and declared that it would "instruct [the jury] to follow the law . . . and decide the case solely upon the evidence that they have heard here in open court." As we have mentioned hereinbefore, the court did so instruct the jury.

The courts generally and properly disapprove of appeals to jurors' pecuniary interests. *United States* v. *Trutenko,* 490 F.2d 678 (7th Cir. 1973). However, such remarks, although improper, do not necessarily constitute reversible error. They must be considered in the context of the entire trial. *Cf. Epperson* v. *United States,* 490 F.2d 98 (7th Cir. 1973); *United States* v. *Mendansky,* 486 F.2d 807, 815 (7th Cir. 1973); *cert. denied,* ..... U.S. ..... (1974). Similarly, prosecutorial comment about the salutary effect on society of a particular conviction must be evaluated in light of the entire closing argument and of the trial as a whole. What we have said heretofore about the nature of the argument, of course, is applicable here.

Also, the court sustained the defendant's objection and included a cautionary instruction in its charge. More significantly, "inflamed passions" and the abandonment of reasoned scrutiny rather obviously do not explain the jury's verdict. Indeed, Reicin in another portion of his brief implicitly concedes this: ". . . the meager evidence introduced by the government, . . . evidenced by the fact that the jury acquitted on 10 of 11 counts. . . ."

We hold therefore that the prosecutor's argument does not require reversal.

The Refusal to Quash the Indictment

Prior to trial, Reicin moved to quash the indictment on the grounds that (1) the Government had "systematically abused the grand jury process," and (2) the indictment was based almost entirely on hearsay evidence. The court denied this motion and subsequent motions based on these grounds. Reicin claims that the district court abused its discretion in so ruling and that it, at least, should have granted him a hearing on the motions.

Although arguably the procedure utilized might harbor a potential for abuse, we find no inherent prejudice to a defendant where Government agents interview witnesses who have been subpoenaed by the grand jury. And, after examining the pertient portions of the record in the present case, we conclude that the district judge acted properly and within the scope of his discretion in refusing to quash the indictment or to arrest judgment, drastic remedies. Further, the materials submited with the various motions were not sufficient to *require* the judge to hold a hearing.

We do not understand that merely because persons have been subpoenaed by the grand jury the Government should be barred from continuing with its investigation and from conducting interviews with those prospective witnesses. In the present case, all but two of the witnesses so interviewed did testify at the trial. Their credibility was subject to examination by the trial jury. Any claimed governmental coercion was also subject to being brought out before the trial jury.

As to the related hearsay contention, *United States* v. *Holmes,* 452 F.2d 249, 274 (7th Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972), and *United States* v. *Daddano,* 432 F.2d 1119, 1125 (7th Cir. 1970), *cert. denied,* 402 U.S. 905 (1971), establish the governing rule in the Seventh Circuit. We decline Reicin's suggestion that we overrule these precedents.

Other points raised by the defendant upon this appeal are ancillary to those discussed herein. Finding no basis for reversal, we affirm the judgment of conviction.

AFFIRMED.

APPENDIX TO THE COURT'S OPINION

The JUNE 1970 GRAND JURY charges:

1. That beginning in or about January 1965, and continuing to on or about date of the filing of this indictment, at Chicago, in the Northern District of Illinois, Eastern Division, and in divers other places to the Grand Jury unknown,

EDWARD E. REICIN

defendant herein, and WILLIAM BECKER, not a defendant herein, devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations

and promises from insurance firms, companies, associations and corporations, including but not limited to: Aetna Insurance Company, Allstate Insurance Company, Chicago Transit Authority, The Hanover Insurance Group, Horace Mann Insurance Group, Inter-Insurance Exchange of the Chicago Motor Club, National Emblem Insurance Company, Northwestern Security Insurance Company, Royal Globe Insurance Company and Unigard Insurance Company and various persons who were clients of said defendant EDWARD E. REICIN, an attorney, well knowing at the time that the pretenses, representations, and promises would be and were false when made; and which said scheme and artifice to defraud so devised and intended to be devised by the said defendant was in substance as follows:

2. It was part of the said scheme and artifice to defraud that WILLIAM BECKER, a duly licensed physician authorized to practice medicine in the State of Illinois, would and did examine persons involved in automobile accidents within the State of Illinois.

3. It was a further part of the said scheme and artifice to defraud that the defendant, EDWARD E. REICIN, duly licensed attorney authorized to practice law in the State of Illinois would and did represent persons involved in automobile accidents within the State of Illinois.

4. It was a further part of the said scheme and artifice to defraud that the defendant would and did prepare and cause to be prepared medical bills and accident reports, which bills and reports contained false and fraudulent pretenses and representations.

5. It was a further part of the said scheme and artifice to defraud that the defendant, EDWARD E. REICIN,

would and did cause his clients to be sent to WILLIAM BECKER, after the clients had been involved in accidents.

6. It was a further part of the said scheme and artifice to defraud that WILLIAM BECKER would and did cause to be furnished to defendant EDWARD E. REICIN, *medical bills* and reports for the said clients of the defendant, EDWARD E. REICIN, and said medical bills and reports contained false and fraudulent pretenses and representations, in that said bills were rendered in amounts far in excess of the amounts actually due and owing, said reports were rendered reflecting nonexistent injuries and damages.

7. It was a further part of the said scheme and artifice to defraud that the defendant EDWARD E. REICIN would and did send and cause to be sent to the said insurance firms, companies, associations and corporations the said medical bills of WILLIAM BECKER and accident reports, knowing that the said medical bills and accident reports contained false and fraudulent pretenses and representations.

8. It was a further part of the said scheme and artifice to defraud that the defendant EDWARD E. REICIN would and did deduct the full amounts of the excessive and fraudulently inflated medical bills from the settlements to his various clients.

9. It was a further part of the said scheme and artifice to defraud that the defendant EDWARD E. REICIN would and did divide between himself and WILLIAM BECKER the amounts of the excessive and fraudulently inflated medical bills deducted from the settlements due his various clients.

10. It was a further part of the said scheme and artifice to defraud that the defendant EDWARD E. REICIN and WILLIAM BECKER would and did cause clients of EDWARD E. REICIN to absent themselves from employment to increase their alleged damages.

11. It was a further part of the said scheme and artifice to defraud that the defendant EDWARD E. REICIN would and did engage various individuals, whose names are unknown to the Grand Jury, to refer accident victims to him.

12. It was a further part of the said scheme and artifice to defraud that the defendant, EDWARD E. REICIN would and did cause clients to obtain automobile repair estimates which estimates were excessively and fraudulently inflated.

13. It was a further part of the said scheme and artifice to defraud that the defendant, EDWARD E. REICIN would and did send and cause to be sent to the said insurance firms, companies, associations and corporations the said excessively and fraudulently inflated automobile repair estimates knowing that the said automobile repair estimates contained false and fraudulent pretenses and representations.

14. . . .

COUNT IX

1. The June 1970 GRAND JURY realleges all of the allegations of the First Count of this indictment except those contained in paragraph 14 thereof.

2. The June 1970 GRAND JURY further charges that on or about September 25, 1967, at Chicago, in the Northern District of Illinois, Eastern Division, the defendant EDWARD E. REICIN, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did knowingly cause to be delivered by the Post Office Department of the United States, according to the directions thereon, a letter addressed to:

Royal Globe Insurance
175 West Jackson Boulevard
Chicago, Illinois
Attention: Mr. Raymond J. Muselon

in violation of Title 18, United States Code, Section 1341.
A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

GOVERNMENT CLOSING ARGUMENT REGARDING COUNT 9

Phillip Eauslin. He is the restaurant supply salesman. He is the man who went to Florida a half a week after the accident and took a dunk in the pool. He enjoyed himself for two weeks. He drove to Florida in the same car that had been in the accident and he drove back with his wife and kids from Florida in the same car that had been in the accident. While he was in Florida for two weeks he doesn't go to a doctor. He didn't have to go to a doctor because the pain he had went away. He said he had pain but it went away. And when he comes back he talks to his boss, a Mr. David Brill. And Brill says, "Go see Mr. Reicin." And he goes to see Reicin and Reicin says, "Go see Dr. Becker." Now in that one visit there is no conversation with Mr. Reicin about taking time off from work except for the two weeks he had already been in Florida, and there are no conversations with Mr. Eauslin and Mr. Reicin that he is going to take off additional time. So what does Reicin do? He writes a letter and requests from Mr. Brill, Eauslin's employer, a time-lost statement, and he gets one for four weeks. And Eauslin testified that he didn't take off four weeks. He took off two weeks and a couple of days sometime during the next two weeks, but he didn't take off no four weeks.

And this Mr. Brill is the person who recommended Mr. Eauslin to Mr. Reicin in the first place, and was the same person who had been a lawyer for Mr. Brill before. Reicin and Brill's relationship goes back, way back, before Eauslin and Reicin's relationship.

Mr. Eauslin's testimony on the subject matter of the time-lost statement, Government's Exhibit I-4. (Reading:)

"Q. Now, sir, I am going to hand you what has been marked as Government Exhibit I-4." I said that to him.

"Have you ever seen that document before other than here today in this courtroom or in my office?

A. No.

Q. To whom is that document addressed?

A. Mr. Reicin.

Q. Do you recognize the signature at the bottom of that letter?

A. Yes.

Q. Have you ever seen that signature before?

A. I am sure I have.

Q. Whose signature do you recognize that to be, assuming you recognize it to be anybody's?

A. David Brill's.

Q. Now, did you ever tell Mr. Brill about a document such as I-4?

A. Did I ever tell him?

Q. Yes. Did you tell him to prepare it?

A. No.

Q. Did you ever discuss it with Mr. Brill at any time?

A. No.

Q. Did you obtain it from him?

A. No.

Q. Did you request it?

A. No."

So what does he do this time? He changes the operation a little bit and goes right to Mr. Brill—I'm talking about Reicin now—and gets from Mr. Brill himself a phony time-lost statement on behalf of Mr. Eauslin. And, again, he accomplishes the overall purpose. Again he blows the special damages out of the legal legitimate proportion.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-15

EDWARD E. REICIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction is invalid because the jury may have predicated its verdict upon an improper theory of guilt, and that his proffer of expert medical testimony was improperly denied.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of an eleven-count indictment charging fraudulent use of the mails, in violation of 18 U.S.C. 1341. He was acquitted on the ten remaining counts. Petitioner was sentenced to a term of eighteen months' imprisonment. The court of appeals affirmed (Pet. App. 1-28; 497 F. 2d 563).

The facts may be summarized as follows: The government charged that petitioner, an attorney, together with Dr. William Becker, had devised and executed a scheme to defraud insurance companies in personal injury cases by falsifying medical reports, inflating charges, and causing claimants to increase their claimed damages by remaining away from work.[1]

The count on which petitioner was convicted concerned the claim of Philip Eauslin, a salesman whose automobile was involved in a collision with a truck on July 5, 1967. After the accident, Eauslin experienced a recurrence of a back pain which had bothered him sporadically for some years. Petitioner suggested that Eauslin see a doctor and arranged an appointment with Dr. Becker. Eauslin saw Dr. Becker once, during which time the doctor examined him briefly and referred him to an x-ray clinic but provided him with no treatment or medication. Dr. Becker's records, however, reflected eleven visits by Eauslin, for which the total charge was $185. Becker refunded one-fourth of this amount to petitioner in cash (Pet. App. 3-5).

1. Petitioner contends that the count on which he was convicted was improperly submitted to the jury on alternative theories of guilt. The indictment charged petitioner

---

[1]Becker, who was convicted of mail fraud prior to petitioner's trial, testified for the government. According to Becker, petitioner would refer personal injury claimants to Becker, and Becker would falsify and exaggerate his medical reports, with petitioner's knowledge. Becker then billed petitioner for the medical services. Petitioner would either pay a portion of the bill, or (after petitioner became concerned that the practice would be discovered) petitioner would pay the face amount of the bill and receive a cash kickback from Becker.

and Becker with numerous actions in furtherance of their scheme, including the representation and examination of claimants, the rendering of excessive charges for medical treatment, and the forwarding of fraudulent claims to insurance companies. The defendants were also charged with having caused claimants "to absent themselves from employment to increase their alleged damages" (Pet. App. 25-27).

In connection with the Eauslin claim, there was ample evidence that petitioner had used the mails to send a false medical report and a false bill to an insurance company in furtherance of a scheme to defraud. There was, however, no evidence that Eauslin had been induced to take unnecessary time off from work (Pet. App. 9).

The jury was instructed that the government need not prove each representation charged in the indictment (Pet. App. 11, n. 7). Petitioner, relying primarily upon *Stromberg* v. *California,* 283 U.S. 359, and *United States* v. *Groves,* 122 F. 2d 87 (C.A. 2), contends that this constituted a presentation of the case to the jury on alternative theories, of which one was invalid, and that conviction upon a general verdict of guilt therefore cannot be sustained.

Stromberg and *Groves*, however, are inapposite. The instant case does not involve separate offenses or separate legal theories. Rather, the indictment charged a single, unitary scheme to defraud insurance companies. Although the indictment listed, by way of illustration, some of the means used to execute the fraud, it was not necessary that the government prove each act or representation in the indictment. It was sufficient that the evidence show merely the existence of a fraudulent scheme and one or more mailings in furtherance of that scheme. *Anderson*

v. *United States*, 369 F. 2d 11, 15 (C.A. 8), certiorari denied, 386 U.S. 976; *Henderson* v. *United States*, 425 F. 2d 134, 139, n. 5 (C.A. 5). "[T]he existence of surplusage in the indictment will not affect the validity of a conviction." *United States* v. *Hyde*, 448 F. 2d 815, 839 (C.A. 5), certiorari denied, 404 U.S. 1058.

2. Petitioner claims error in the district court's refusal of his proffer of an expert medical witness who would have refuted Dr. Becker's statement that petitioner's clients were hospitalized unnecessarily. As the court of appeals correctly pointed out, however (Pet. App. 15-17), the issue was whether the patients were hospitalized unnecessarily in the view of Dr. Becker, who was the only physician they consulted at the time of the events in question. Accordingly, subsequent *ad hoc* analysis of the patients' medical needs by another medical expert could have no bearing on petitioner's good faith at the time he referred his clients to Dr. Becker. The proffered testimony was, therefore, wholly irrelevant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10

LIBRARY
SUPREME COURT, U. S.

FILE
OCT 29
MICHAEL RODAK, JR.

No. 74-15

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Respondent,

vs.

EDWARD E. REICIN,

Petitioner.

Petitioner's Reply

THOMAS P. SULLIVAN
ALAN L. METZ
Attorneys for Petitioner

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-15

UNITED STATES OF AMERICA,

Respondent,

vs.

EDWARD E. REICIN,

Petitioner.

PETITIONER'S REPLY

INTRODUCTION

The Seventh Circuit Court of Appeals described this case as "a scheme to defraud insurance and other companies in personal injury cases by [1] preparing and submitting false and exaggerated medical reports and bills to the companies and [2] by causing claimants 'to absent themselves from employment to increase their alleged damages.'" (A. 2).

With respect to Count 9, the only count on which petitioner was convicted, the prosecutor, in fact, argued only the second charge, that petitioner defrauded the insurance company by causing the claimant, Eauslin, to absent himself from his employment. (A. 29-30).

The trial judge refused to strike the lost time charge from Count 9, and over defense objections instructed the jury that it could convict if either the medical bill charge or the lost time charge were proven.

The government admitted on appeal, the Court of Appeals found, and the Solicitor General admits that there was "no evidence that Eauslin had been induced to take unnecessary time off from work." (Gov't. Br. p. 3).

Nevertheless, petitioner stands convicted upon a general jury verdict which does not specify on which charge the jury based its verdict. Petitioner requests remand for a new trial.

I.

The Decision Below Clearly Conflicts With This Court's Ruling in Stromberg v. California and With the Second Circuit's Decision in United States v. Groves.

The Solicitor General accepts the rule of law enunciated by this Court in *Stromberg v. California*, 283 U.S. 359 (1931). This rule, which requires reversal of a general jury verdict which may have been based on unconstitutional, erroneous or unproven, alternative grounds of guilt, has been consistently applied in both criminal and civil cases. See, e.g., *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U.S. 613 (1959); *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 (1974).

The *Stromberg* rule was applied in *United States* v. *Groves*, 122 F.2d 87 (2d Cir. 1941). *Groves* was a multi-count mail fraud prosecution with each count containing three separate means by which the fraud was practiced. Because the jury was allowed to convict on any of the three means, and because the government failed to prove two of the three means, the conviction was reversed.

Groves is indistinguishable from this case. In the case at bar the government charged, attempted to prove and argued to the jury that there were two means by which the fraud was practiced—inflated medical bills or inflated lost time. On Count 9, the government argued only the lost time charge, on which, as the Solicitor General concedes, there was no evidence.

To be sure, the indictment contains surplusage. Petitioner does not argue that each act or representation alleged in the indictment need be proved. However, mere recitation of the litany that "it was not necessary that the government prove each act or representation in the indictment" (Gov't. Br. p. 3) does not meet the issue in this case. When two means of accomplishing the fraud are alleged in the indictment, when the government argues the case in the same manner, and when the jury is instructed that it can convict on *either,* the petitioner is entitled to have a *prima facie* case made on both. To hold otherwise is contrary to *Stromberg, Groves* and the other cases cited by petitioner and permits a verdict in violation of the due process requirement set forth in *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960).

The three cases cited by the Solicitor General are not to the contrary. None of the cases deals with the issue in the case at bar. There is no indication that the indictments in the 3 cases cited charged alternative means of practicing the fraud, that the prosecutors argued alternatively, or that the juries were instructed alternatively.

The cases are further distinguishable on their facts. In *Anderson* v. *United States,* 369 F.2d 11, 15 (8th Cir. 1966), the portion of the decision referred to by the Solicitor General deals with the question of whether criminal intent

was shown, not with the existence of alternative charges. In *Henderson* v. *United States,* 425 F.2d 134 (5th Cir. 1970), the Court reversed the two mail fraud counts on jurisdictional grounds, and stated in dictum that all misrepresentations were proven. Finally, *United States* v. *Hyde,* 448 F.2d 815 (5th Cir. 1971), a Hobbs Act prosecution, is simply inapposite. Surely, the Solicitor General cannot contend that the lost time charge was "surplusage" as was the case before the Fifth Circuit Court of Appeals in *Hyde.* After charging, arguing and instructing that the lost time charge was a proper basis for conviction, the government should not now be allowed to claim that the charge is surplusage.

II.

The Trial Court Prejudicially Erred in Refusing to Allow Petitioner to Call Dr. Atlas As An Expert Witness.

Dr. Becker testified that he would not have hospitalized any of the claimants absent petitioner's requests. Although the Court of Appeals recognized that this testimony "undoubtedly helped the Government's case," (A. 15) the Court inconsistently held that any impeachment of that testimony was "collateral". (A. 16). The Solicitor General erroneously argues that the sole purpose of Dr. Atlas' testimony was to show that hospitalization, contrary to Becker's testimony, was necessary.

In fact, Dr. Atlas' testimony would have given petitioner a factual basis to argue the following: (1) that Becker lied or was mistaken when he said petitioner requested hospitalization since Becker admitted that he didn't recall the requests but insisted petitioner made the requests based on the fact that the claimants "really did not need the hospitalization." (R. 272-73); (2) that the medical bills were

not false as charged in the indictment; and (3) that petitioner acted in good faith and without intent to defraud in the event the jury chose to believe Becker when he testified that petitioner requested hospitalization.

It is undisputed that this was a close case. At the close of the government's proof, the trial judge struck portions of the indictment for total failure of proof. The jury acquitted on 10 of 11 counts. And, the Solicitor General agrees that one half of count 9 was unproven. Under all the circumstances, preventing the jury from hearing *all* facts bearing on the question of intent denied petitioner a fair trial.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

THOMAS P. SULLIVAN
ALAN L. METZ
Attorneys for Petitioner

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
222-9350